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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re: COUNTRYWIDE FINANCIAL CORP.)
MORTGAGE MARKETING AND SALES)
PRACTICES LITIGATION)

Lead Case No. 3:08-md-1988 DMS
(WMC)

THIS DOCUMENT RELATES TO:)

CLASS ACTION

RANDALL D. BUCKLEY, an individual man;)
and JUNE TAYLOR, an individual woman, on)
behalf of themselves and all others similarly)
situated,)

Case No. 3:09-cv-0064 DMS (WMC)

Plaintiffs,)

**PLAINTIFF BUCKLEY'S RESPONSE
TO MOTION TO STRIKE
PORTIONS OF ARI Y. BROWN'S
DECLARATION IN SUPPORT OF
MOTION FOR CLASS
CERTIFICATION**

v.)

COUNTRYWIDE HOME LOANS, INC., a New)
York corporation; and COUNTRYWIDE)
FINANCIAL CORPORATION, a Delaware)
corporation,)

Date: December 11, 2009
Time: 1:30 p.m.
Courtroom: 10
Judge: Hon. Dana M. Sabraw

Defendants.)

1 Countrywide has filed a Motion to Strike two paragraphs of the Declaration of Ari Y.
2 Brown (“Brown Declaration”) filed in support of the Motion for Class Certification. The
3 paragraphs to which Countrywide objects summarize counsel’s review of selected documents from
4 the portions of loan files that Countrywide agreed to produce. Countrywide’s objections are
5 without merit and this motion should be denied.

6 Countrywide’s objects to Paragraphs 23 and 24 to the Brown Declaration for the following
7 reasons: (1) it claims that the facts in the declaration regarding the results of the review of loan
8 files were not based on personal knowledge; (2) it objects that counsel fails to authenticate or
9 identify the specific documents or loans at issue; and (3) it objects to the characterization of certain
10 changes in loan terms as being material changes.

11 As an initial matter, Paragraphs 23 and 24 of the Brown Declaration summarized
12 voluminous information as specifically permitted under ER 1006. *See United States v. Evans*, 572
13 F.2d 455 (5th Cir. 1978) (holding that summary of documents admissible under identical Fed. R.
14 Evid. 1006). More specifically, Countrywide’s objections are not based on substance. Its
15 objection that facts stated are not based on personal knowledge is based on a linguistic quibble. To
16 be clear, while Mr. Brown was assisted by other members of his firm in reviewing the loan files
17 produced, he personally reviewed each of the 66 loans the declaration identifies as reflecting
18 material differences between the final terms reflected in the mortgage note and HUD-1 settlement
19 from the terms listed on the earlier Good Faith Estimates and Truth in Lending Disclosures. *See*
20 Reply Declaration of Ari Brown (“Brown Reply Decl.”), ¶ 11.

21 Countrywide’s second objection – that the declaration fails to authenticate or identify the
22 specific documents or loans at issue, has already been resolved. On the evening of October 13,
23 Countrywide’s counsel demanded that by noon the following day, Plaintiff provide a chart
24 identifying the 66 loans referenced in paragraph 23 of the declaration, identifying the loan numbers
25 relied upon, and identifying the material changes alleged to have occurred in connection with each
26 loan. Countrywide’s counsel claimed that this was the information needed to test the factual
27 assertions in the Brown Declaration. *See id.*, Ex. 33. Plaintiff’s counsel complied with this
28

1 demand and sent the requested chart the next day. *Id.*, Ex. 34. Notwithstanding the fact that all of
 2 its demands were met, and Plaintiff provided all the information it claimed it needed to authenticate
 3 the documents relied on (all of which were produced by Countrywide), Defendant still objects on
 4 the same basis. This objection is simply not well founded and should be denied.

5 Countrywide's claim that the Brown Declaration offers expert opinion as to what
 6 constitutes a material change is simply wrong. The declaration details the following discrepancies
 7 in loan files considered to be material: (1) an increase from the interest rate disclosed; (2) a
 8 reduction in the amount of time the initial interest rate would be fixed; (3) a yield spread premium
 9 that was not disclosed; (4) an increase in the amount of discount points or origination fees the
 10 borrower paid; and (5) a monthly payment that only covered interest when disclosures presented
 11 the payment as covering principal and interest. Brown Decl., ¶ 23. The declaration further
 12 described limiting assumptions counsel employed in determining what changes were not
 13 considered material. Specifically, the following discrepancies were not considered: any change in
 14 APR of less than 1/8 of one percent; an increase in the points and fees that were due solely to an
 15 increase in loan; an increase in the amount paid in points or fees of \$100 or less. *Id.*, ¶ 24.

16 None of this constitutes opinion. It is rather a description of the findings based on a review
 17 of the loan files – all of which Countrywide can test and verify. The standards employed are
 18 derived from the applicable law regarding mortgage disclosure. Each of the types of discrepancies
 19 identified regard loan terms that are required to be disclosed under the Washington Mortgage
 20 Broker Practices Act and Consumer Loan Act. *See* RCW 19.146.030 (2)(a) (requiring written
 21 disclosure of the annual percentage rate, amounts and number of payments, whether a loan contains
 22 a variable interest rate and, if so, the circumstances under which the rate can increase); RCW
 23 19.146.030(1) (requiring disclosure of all points and fees that the borrower will be required to pay
 24 and itemization of the fees that inure to the benefit of the mortgage broker); *Anderson v. Wells*
 25 *Fargo Home Mortg., Inc.*, 259 F. Supp. 2d 1143, 1146 (W.D. Wash. 2003) (holding that a yield
 26 spread premium is among the items that must be disclosed on a Good Faith Estimate in advance,
 27 not at closing when it would be too late to be of use to the borrower); *see also* Interagency
 28

Guidance on Nontraditional Mortgage Product Risks, 71 C.F.R. § 58609 (Oct. 4, 2006) (identifying material risks posed by failure to disclose whether payment fully covers a borrower's obligation and whether negative amortization can occur) (Brown Reply Decl., Ex. 37).

The limiting factors counsel applied in not considering certain changes to be material were similarly derived from requirements in applicable statutes or regulations. *See* 12 C.F.R. § 226.22(a)(2) (allowing that the annual percentage rate to be disclosed under TILA shall be considered accurate if it is within 1/8 of 1 percentage point of the rate disclosed); WAC 208-660-130 (3)(b) (allowing that a broker need not provide additional written disclosure if a change is due solely to an increase in loan amount provided that the fees were expressed as a percentage on the disclosures). In sum, the standards counsel applied in determining which changes are material are derived from legal disclosure requirements and do not constitute opinion and are entirely proper to include in a declaration regarding the summary of a review of thousands of pages.

Finally, both the motion to strike and Countrywide's response miss the mark in their challenges to the review of loan files. The purpose of this review, and of the summary in the Declaration, was to demonstrate that the proposed class will satisfy the requisite numerosity. Countrywide has represented that it extended over 80,000 loans in Washington during the class period. Plaintiff reviewed less than 1/4 of 1 percent. For purposes of certifying the Class, it makes little difference whether counsel's estimates prove inexact, as there are more than enough for the Court to certify a class. *See, e.g., Westways World Travel, Inc. v. AMR Corp.*, 218 F.R.D. 223, 233-34 (C.D. Cal. 2003) (rejecting defendant's argument that plaintiff's estimate of class size was too speculative, and holding that "Plaintiffs may rely on reasonable inferences drawn from the available facts in estimating the size of the class").

Plaintiff's counsel's review showed that 66 of 178 loan files showed that borrowers received different loan terms than the terms disclosed to them on *any* written disclosures provided before closing. This did not include files that showed different terms on initial disclosures that were corrected with a written disclosure provided *before* closing.¹ Countrywide challenges this figure

¹ Countrywide's claim that Plaintiff's determination of loans in the class did not take "interim" disclosures into account is incorrect.

1 and states that there are but 33 loans with discrepancies between written disclosures and final loan
2 terms. This dispute must await further discovery and analysis of the loan files to be resolved, the
3 difference is immaterial here. *See* Supplemental Declaration of Bryce Ward Ph.D., ¶ 40. Whether
4 the class is comprised of over 30,000 individuals as Plaintiffs' preliminary review suggests or a
5 mere 15,000 that Defendant apparently contends, the class will be more than sufficiently numerous
6 to satisfy the requirements of CR 23(a).

7 Plaintiff's review as summarized in the Brown Declaration was preliminary and not
8 intended to determine the precise size of the class. Such determination must await full production
9 from Countrywide, including the electronic data that Countrywide has retained for each borrower.
10 Plaintiff's expert has already confirmed his ability to develop a database and automated method to
11 determine which borrowers are included in the class and then to calculate damages for each of
12 them based on information that Countrywide has retained. *See* Declaration of Bryce Ward Ph.D.,
13 (Dkt. No. 190-4), ¶¶ 4-7, 10-14.

14 While the process of ascertaining the class and calculating damages will be mechanical, it
15 will require that Countrywide cooperate with, and not hinder, production of information. Early in
16 this case, Plaintiff recognized that the process of reviewing data to ascertain the size of the class
17 would be a large undertaking. In early March, Plaintiff's counsel suggested that the parties agree
18 to a process whereby Plaintiff would review a limited number of documents from a sample of loan
19 files. *See* Brown Reply Decl., ¶ 14. Plaintiff asked again a few weeks later and detailed a process
20 that would start with basic list of information regarding each loan made in Washington during the
21 class period. From this list, Plaintiff would select 1000 loans in an effort to create a cross-section
22 of the loans Countrywide extended throughout Washington. *Id.*, Ex. 36. Defendant claimed that
23 producing documents from 1000 loans was excessive and unnecessary in advance of class
24 certification. Ultimately, the parties had to enlist the help of the Magistrate who ordered that
25 Defendant produce selected documents from 200 loan files. Plaintiff's counsel made clear that the
26 200 files to be designated were not intended to constitute a scientifically representative sample of
27 loan files. *Id.*, ¶ 15.

Countrywide did not begin producing loan files until mid July. It produced on a “rolling basis” in which it delivered several hundred pages every few weeks. At the time Plaintiff filed his motion for class certification, Countrywide still had not completed its production. *Id.*, ¶ 16. Countrywide often did not produce documents from loan files together, or even in the same production. Documents from particular loan files were often scattered and spread over productions made weeks apart. *See, e.g.*, Declaration of Timmothy Riddiough, at 13 n.25 (noting the documents for a particular loan spread over nearly 1000 bates numbers).

Plaintiff nonetheless completed a preliminary review that is more than adequate to estimate that the size of the class satisfies the requirements of CR 23(a). Plaintiff did not seek to do more than that. Defendant’s attempt to strike the testimony regarding the results of that review should be denied.

Dated: December 3, 2009

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CERTIFICATE OF SERVICE

On December 3, 2009, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following attorneys of record:

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Executed this 3rd day of December, 2009, in Seattle, Washington.

HAGENS BERMAN SOBOL SHAPIRO LLP

By: /s/ Steve W. Berman
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